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No. 87-460

In the Supreme Court of the United States

OCTOBER TERM, 1987

JUAN LUIS BOSCIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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3 pp

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is filed pursuant to Rule 22.6 of the Rules of this Court to address the significance of an intervening action of the Court of Appeals for the Ninth Circuit. As we explained in our opposition to the petition for a writ of certiorari, there currently is a split in the circuits on the appealability of claims of grand jury error. The First and Tenth Circuits have held that the denial of a motion to dismiss an indictment on grounds of grand jury error may not be reviewed on appeal before trial. See *United States* v. *Larouche Campaign*, 829 F.2d 250 (1st Cir. 1987); *United States* v. *Taylor*, 798 F.2d 1337 (10th Cir. 1986).* The Ninth Circuit, in contrast, has held that

* These courts have taken different approaches, however; the Tenth Circuit held in *Taylor* that most claims of grand jury error may be raised on appeal after conviction, while the First Circuit in *Larouche Campaign* reserved judgment on the question whether such claims are ever appealable.

all grand jury claims may be raised on interlocutory appeal. See *United States* v. *Benjamin*, 812 F.2d 548 (1987); *United States* v. *Dederich*, 825 F.2d 1317 (1987). In our opposition we nevertheless suggested that it would be premature for the Court to consider this issue because petitions for rehearing en banc were pending in *Benjamin* and *Dederich* that, if granted, might have eliminated the conflict. On December 4, 1987, however, the Ninth Circuit denied the government's rehearing petitions in both *Benjamin* and *Dederich*, thus dispositively establishing the conflict in the circuits.

We believe that the decision below—that challenges to grand jury actions may not be raised on interlocutory appeal—is correct. But the appealability issue, which may arise in every case involving claims of grand jury error, is of considerable practical importance. Because there is now a firmly established split in the circuits on the proper approach for courts to take in resolving challenges to grand jury actions, and because review of the decision below would allow the Court to settle the question during its current Term, we believe that it would be appropriate for the Court to consider the issue at this time.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

DECEMBER 1987

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